IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 772

LAKE ONTARIO LAND DEVELOPMENT AND BEACH PROTECTION ASSOCIATION, INC., *Petitioner*

v.

FEDERAL POWER COMMISSION, *Respondent*

and

POWER AUTHORITY OF THE STATE OF NEW YORK, GREAT LAKES-ST. LAWRENCE ASSOCIATION, *Intervenors*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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JOINT BRIEF FOR THE RESPONDENT AND INTERVENORS IN OPPOSITION

OPINIONS BELOW

Opinions No. 255 (R. 192-219) and No. 256 (R. 220-227) of the Federal Power Commission, both adopted on July 10, 1953, and issued on July 15, 1953, have not been reported as yet. The opinion of the Court of Appeals (R. 422-434) has not been reported yet. See also *Matter of Power*

Authority of the State of New York, 9 F.P.C. 301 (R. 50-60).

JURISDICTION

The judgment of the Court of Appeals was entered on January 29, 1954 (R. 436). A timely petition for rehearing en banc (R. 438-446) was denied after consideration by eight judges on February 18, 1954 (R. 447). The petition for a writ of certiorari was filed on May 19, 1954. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

This brief in opposition is being filed shortly after receipt of the petition in the hope that the petition for certiorari will be acted upon at this term of Court. Delay in construction postpones savings of over $2,500,000 per month to the electric consumers of the Northeast, where a market for low-cost hydroelectric power is ready and waiting. Comparable savings may be expected in Canada. If certiorari is denied before the Court's summer recess, it is believed that financing can be obtained and construction begun by July 1st. Otherwise, the whole project, including the construction of the St. Lawrence Seaway, may have to wait until the next construction season, in the spring of 1955. See R. 401-405, for Motion to Expedite below.

QUESTION PRESENTED

The only question presented by the petition (Pet. 2) is whether riparian property on Lake Ontario will be taken without just compensation in violation of the Fifth Amendment by reason of the issuance of a license by the Federal Power Commission to the Power Authority of the State of New York for the construction of a power project on the St. Lawrence River more than seventy miles down stream from the outlet of Lake Ontario.

No such question was raised below, although the petitioner did assert below that the remedies available to the riparian owners were inadequate on other grounds. Many

other constitutional and other contentions presented below by this petitioner, as well as by other parties who did not petition for certiorari, have been abandoned.

TREATY AND STATUTES INVOLVED

The pertinent provisions of the Boundary Waters Treaty (36 Stat. 2448), of the Federal Power Act (41 Stat. 1063, as amended, 16 U.S.C. 791-823), The St. Lawrence Seaway Development Corporation Act, (68 Stat. 92) and the New York Power Authority Act are all found in Appendix A, *infra*, pp. 23-27.

STATEMENT

Petitioner, an association of owners of real property located on the southern shore of Lake Ontario, seeks the review of a license granted by the Federal Power Commission to the Power Authority of the State of New York for the construction of a hydroelectric power project on the American side of the International Rapids section of the St. Lawrence River, designated in the records of the Federal Power Commission as "Project 2000." It bases its standing to challenge the validity of the license on the assertion that as the result of the construction of the project the level of Lake Ontario would be raised, thereby injuring the property of petitioner's members (R. 2).[1]

1. The Nature of the International Rapids Project.

The St. Lawrence River extends for some 1,200 miles from Lake Ontario to the Strait of Belle Isle. The initial reach of the river, extending for 68 miles from Lake Ontario to Chimney Point near Ogdensburg, New York (Thousand Islands section) descends only slightly and offers little obstacle to navigation.[2] The same holds true

[1] It should be noted at the outset that none of the owners of riparian lands in the River itself whose properties concededly will be flooded have challenged the Commission's order. The only attack comes from a representative of landowners on Lake Ontario who may not be affected at all.

[2] H. Rept. 1215, 83d Cong., 2d Sess., p. 30.

for the stretch of the river below Montreal. Between Chimney Point and Montreal, however, a distance of 114 miles, the river drops some 217 feet in a series of rapids.[3] Of this reach only the first 48 miles between Chimney Point and St. Regis, in which the St. Lawrence River forms the international boundary between the United States and Canada[4], are relevant to this litigation.[5] As the result of a concurrence of favorable natural circumstances, a drop of 92 feet[6] and an unusually steady flow of the river caused by the storage functions of the Great Lakes,[7] this International Rapids section is a "power engineer's dream";[8] it constitutes one of the last large low-cost sources of electric power in the northeastern United States (R. 199). At the same time the portion of the St. Lawrence River between Chimney Point and Montreal constitutes a bottleneck preventing ocean-going vessels from reaching the Great Lakes.[9]

The power project,[11] so far as relevant here, provides for a "controlled single stage project" consisting of a

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[3] H. Rept. 1215, 83d Cong., 2d Sess., pp. 30-31.

[4] R. 74, Exh. 106, par. 32, R. 378; H. Rept. 1215, 83d Cong., 2d Sess., pp. 30-31, see also Map opposite p. 32.

[5] The remainder of the [illegible] miles in which the river drops some 125 feet is located entirely in Canada and not subject to the Federal Power Commission license here under review.

[6] R. 74.

[7] R. 378. The ratio of maximum to minimum flow is only slightly more than two to one, in contrast with the 33:1 and 115:1 ratios of the Columbia River at Bonneville and of the Tennessee River at Florence, Alabama (Wilson Dam). R. 53, 195-196. See also S. Rept. 810, 80th Cong., 2d Sess., p. 91.

[8] S. Rept. 810, 80th Cong., 2d Sess., pp. 45-46.

[9] S. Rept. 441, 83d Cong., 1st Sess., p. 26. At present a 14-foot canal bypasses this section on the Canadian side; the controlling depth of the channel in the Great Lakes and the Thousand Islands section amounts to 25 feet; below Montreal it is more than 30 feet. *Ibid.*, Map facing p. 12.

[11] The technical aspects of this project go back to a January 3, 1941 Report which formed the engineering basis of an agreement between the United States and Canada for the construction of seaway and power installations by the two countries. This agreement, however, never obtained the required Congressional approval. Cf. S. Rept. 810, 80th Cong., 2d Sess., pp. 40-44; S. Rept. 441, 83d Cong., 1st Sess., pp. 6-10; H. Rept. 1215, 83d Cong., 2d Sess., p. 34.

control dam in the vicinity of Iroquois Point, a dam in the Long Sault Rapids at the head of Barnhart Island, and two power-houses (physically joined), one on either side of the international boundary at the foot of Barnhart Island.[12] The American half of the project will have a capacity of 1,100,000 horse power, which can produce 6.3 billion kilowatt hours of electrical energy per year on the American side of the river, and will benefit not only New York State but adjoining areas in other states. Similar benefits will accrue on the Canadian side of the river. The power project is a complementary part of the St. Lawrence Seaway plan designed to permit ocean-going vessels to enter the Great Lakes. In the International Rapids section the Seaway calls for a controlling channel depth of 27 feet and two relatively short[13] canals, one around the control dam at Iroquois Point, the other one by-passing the installations at Long Sault Dam and Barnhart Island Powerhouse.[14]

2. Proceedings Before The International Joint Commission.

Since the International Rapids section is a boundary river, the utilization of its power and its canalization require the agreement of the riparian sovereigns. In 1909 the United States and Great Britain,[15] "being equally desirous to prevent disputes regarding the use of boundary waters * * * and to make provision for the adjustment and settlement of all such questions as may hereafter arise,"[16] concluded a treaty relating to the boundary waters

[12] H. Rept. 1215, 83rd Cong., 2d Sess., p. 48.

[13] Since the dams turn a large portion of the St. Lawrence into deep lakes, only short canals around these installations are required. Accordingly, the construction of the Seaway is financially dependent upon the building of the power phases of the St. Lawrence Project. Cf. S. Rept. 441, 83d Cong., 1st Sess., pp. 12, 13.

[14] H. Rept. 1215, 83d Cong., 2d Sess., p. 31, and Map facing p. 32.

[15] Direct diplomatic relations between the United States and Canada had not been established at that time.

[16] See the Preamble of the Treaty, 36 Stat. 2448.

between the United States and Canada. This Treaty confers upon the International Joint Commission, created by the same agreement, the authority to approve "uses or obstructions or diversions * * * * of boundary waters on either side of the [boundary] line, affecting the natural level or flow of boundary waters on the other side of the line" (Art. III, *infra*, p. 23). It also confers upon the Commission the power, and in some circumstances the duty, to provide for the protection and indemnity of all interests adversely affected by the project (Art. VIII, *infra*, pp. 23-24).

On June 30, 1952, the United States and Canada agreed to submit to the International Joint Commission concurrent applications for the construction of power installations in the International Rapids section of the St. Lawrence River.[17] At that time it was left undetermined whether Canada would build the entire Seaway on its side of the St. Lawrence River or whether the United States would build the canals in the International Rapids section.

Complementary applications filed with the International Joint Commission on June 30, 1952[18] were approved by the International Joint Commission on October 29, 1952 (Docket No. 68) (R. 357-365). The Commission's Order of Approval called for the construction, maintenance, and operation of the above-described power installations on the Canadian side by the Hydro-Electric Power Commission of Ontario (R. 358-359); on the United States side by an entity to be designated by the United States Government instead of by the United States itself (R. 359).

Paragraph (a) of the Order provides that all interests on either side of the boundary which would be injured by the construction, maintenance, or operation of the project should "be given suitable and adequate protection and indemnity in accordance with the laws of Canada or the Constitution and laws in the United States, respectively,

[17] R. 68-72, S. Rep. 441, 83d Cong., 1st Sess., pp. 45-47.
[18] R. 73-82, S. Rept. 441, 83d Cong., 1st Sess., pp. 9, 40-43, 47-51.

and in accordance with the requirements of Article VIII of the Treaty" (R. 360).

In connection with regulation of water levels, the Order contained detailed provisions. It established a Board of Control charged with the supervision of water levels, the regulation of the discharge of water from Lake Ontario and the flow of water through the International Rapids Section (R. 362). In performing these functions, the Board must meet the requirements of paragraphs b-d of the Order of Approval (R. 363), *i.e.* give preference to domestic and sanitary uses of the water (par. b); safeguard the rights of the lower riparian power interest (par. c); and protect "so far as possible the rights of all interest affected by the levels * * * of Lake Ontario" (par. d) (R. 360). The method of regulating river levels must take into account the needs of navigation as well as power, and assure a depth of water adequate for traffic through the seaway which Congress has just authorized, see *infra*, p. 11.

To the extent that there then should be a prejudicial change of those levels these rights were subject to the compensation provisions of paragraph (a) of the order (R. 360). The Order assumed that these goals could be obtained by following Method of Regulation No. 5, prepared by the Department of Transport of Canada in 1940 (R. 363); it provided, however, for the modification of this method of regulation, if it should appear necessary (R. 363-364, 399). In this connection it may be pointed out that under the final paragraph of the Order the International Commission expressly retained jurisdiction over the subject matter (R. 365), and is now reconsidering the method of regulating the level of Lake Ontario. See *infra*, p. 12.

3. Proceedings Before the Federal Power Commission.

On September 11, 1952, the Power Authority of the State of New York filed an amendment to an earlier application [No. 2000] for a license to construct a power project in the International Rapids area (R. 64). The motion of

petitioner herein for leave to intervene, based on the claim that the construction of the project would raise the water levels of Lake Ontario and subject its members' properties to flooding (R. 92-94), was granted on November 13, 1952 (R. 99).

Petitioner took the following positions: (a) that the project should be licensed only on condition that the water level on Lake Ontario be maintained at or below 247.38 feet at all times; (b) that further studies be made to determine (1) the natural level of Lake Ontario in view of the removal of the Gut dam in the International Rapids ordered by the International Joint Commission, and (2) the additional costs of the project caused by the injuries to petitioner's property; and (c) that the license be denied (R. 114-115).

In order to understand petitioner's contention it is well to have in mind the physical arrangement of the project. *Cf.* H. Rept. 1215, 83rd Cong., 2nd Sess., Map facing p. 32. It consists of three main facilities: the Long Sault, Barnhart Island and Iroquois Control Dams. The Long Sault Dam extends between the American shore and Barnhart Island. The Barnhart Island Dam will extend from that Island to the Canadian shore. Turbines, generators and associated facilities will be located on the Barnhart Island Dam. The Long Sault and Barnhart Island Dams will create a pool at a level initially of 238 feet, which may be increased to 242 feet with approval of the International Joint Commission after a trial period (R. 364). They are located approximately 103 miles from Lake Ontario. They are to be operated on a run of the river basis (R. 39) and there is no evidence that they will have any effect on the level of Lake Ontario.

Upstream from these dams at a distance of 78 miles from Lake Ontario will be located the Iroquois Control Dam. This dam will serve to regulate water levels on Lake Ontario and in downstream sections of the St. Lawrence River. This dam, as well as the rest of the project, will

be operated under instructions of the International Joint Commission, through the International St. Lawrence River Board of Control, a subordinate agency created by it.

In the hearings before the Presiding Examiner (trial examiner) petitioner did not introduce any affirmative evidence to support its petition but limited itself to the cross-examination of two of the Power Authority's witnesses (R. 122, 391-399).

This evidence, which is reproduced in its entirety at R. 391-399, did not show that the effect of this control of the Iroquois Dam by itself would jeopardize petitioner's interests.

With respect to Method of Regulation No. 5, which the International Joint Commission originally approved, but which it is now reconsidering, and upon which petitioner focuses its main attack, the evidence disclosed that this method of regulation would actually lower the maximum level of Lake Ontario from 249.27 to 249.10 (R. 394, 398).

The Presiding Examiner found that there was no evidence to the effect that the maintenance of levels higher than 247.38 feet would by itself cause damage to property; that there might not be any injury at all caused by the project; and that in any event, if land should be flooded, the owners of such property would be entitled to compensation and that their remedy was with the courts (R. 122).

The Federal Power Commission upheld the decision reached by the Presiding Examiner. In its Opinion No. 255 issued on July 15, 1953 (R. 192-217)[19] it granted a license to the Power Authority of the State of New York.[20]

Art. 19 of the license issued by the Commission provided expressly that "in the design, construction, maintenance

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[19] Opinion No. 256 (R. 220), issued the same day, rejected the application filed by Public Power and Water Corporation, a competing applicant.

[20] The license was accepted by the Power Authority of the State of New York on November 3, 1953. On November 4, 1953 the President of the United States in Executive Order No. 10,500 (18 F.R. 7005) declared the Power Authority to be the designee of the U. S. Government for the construction of the power project. H. Rept. 1215, 83d Cong., 2d Sess., p. 32.

and operation of the project * * * the Licensee shall comply with all applicable provisions and requirements of the Order of Approval" of the International Joint Commission described *supra*, pp. 6-7 (R. 214). The license was also subject to all the terms and conditions of the Federal Power Act, incorporated by reference, including Section 10(c) of the Federal Power Act, which provides that the licensee is liable for all damages to the property of others caused by the construction, maintenance, or operation of the licensed project.[21]

Pursuant to Section 313(a) of the Federal Power Act, petitioner applied to the Federal Power Commission for rehearing and at the same time moved for leave to file additional evidence (R. 249). The petition and motion were denied (R. 259); the latter on the ground that petitioner had not shown why it could not have tendered its evidence while the hearings were in process. The Commission pointed out that the proper forum to hear petitioner's objections to the method of regulating the level of Lake Ontario was not the Federal Power Commission but the International Joint Commission, and found that there were no facts in the record showing that petitioner is an aggrieved party (R. 260).

4. Proceedings in the Court of Appeals.

Petitioner thereupon, pursuant to Section 313(b) of the Federal Power Act, filed its petition for review in the United States Court of Appeals for the District of Columbia Circuit (R. 1-18).[22] The Court of Appeals affirmed the decision of the Federal Power Commission,[23] and dis-

[21] R. 207; see also Art. 18 of the License (R. 214).

[22] Petitions for review were also filed by Public Power and Water Corporation, a competing applicant for the license, and Central Pennsylvania Coal Producers' Association, an intervenor. Neither of them, however, filed a petition for certiorari.

[23] A motion for leave to adduce additional evidence, filed pursuant to Section 313(b) of the Federal Power Act (R. 406) was denied by the Court of Appeals on December 29, 1953 (R. 421).

posed of this petitioner's contentions in a single paragraph[24] as follows (R. 433-434):

> Petitioner Lake Ontario Land Development and Beach Protection Association, Inc., is an association composed of homeowners whose properties border on Lake Ontario. They say that the construction of the Iroquois Dam will raise the level of the water in Lake Ontario to such a point that in stormy weather their properties will be damaged. There is a dispute as to whether the project works to be constructed under the license will or will not increase the water levels in Lake Ontario. However that may be, the matter was submitted to the International Joint Commission and was determined by it, and, moreover, a further study of the matter is under way in a pending proceeding before that Commission. In approving the international aspects of the project the Joint Commission required that all interests injured be given "suitable and adequate protection and indemnity in accordance with the laws in Canada or the Constitution and laws in the United States respectively." Moreover Section 10(c) of the Federal Power Act provides that each licensee shall be liable for all damages occasioned to the property of others.

5. Congressional Authorization of U. S. Participation in the Construction of the St. Lawrence Seaway and the Reconsideration of Method of Regulation No. 5.

On May 13, 1954, the President approved the St. Lawrence Seaway Development Corporation Act. Pub. L. 358, 68 Stat. 92.[25] The functions of the corporation, as defined in Section 3 of the Act (*infra*, pp. 25-26), are, basically, to construct those navigation features of the 1941 Report (*supra*, p. 4, fn. 11) which are located in United States territory, *i.e.*, the construction of canals by-passing the dams to be built in connection with the power project,[26] and the

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[24] The great bulk of the opinion below rejected certain attacks upon the legality of the license which petitioner does not raise here. R. 434-433.

[25] For the background of this legislation see S. Rept. 441, 83d Cong., 1st Sess., p. 10; H. Rept. 1215, 83d Cong., 2d Sess., pp. 34-35, 36-37.

[26] H. Rept. 1215, 83d Cong., 2d Sess., pp. 31, 48-49.

deepening of the channel in the Thousand Islands section of the St. Lawrence River. The close interrelation between the Seaway and power plans appears from Section 3(a)(2), which provides that the corporation shall not proceed with construction unless and until it has received satisfactory assurances that

> the State of New York, or an entity duly designated by it, or other licensee of the Federal Power Commission, in conjunction with an appropriate agency in Canada, as nearly as possible concurrently with the navigation works herein authorized, will construct and complete the dams and power works approved by the International Joint Commission in its order of October 29, 1952 (docket 68) *or any amendment or modification thereof.*[27] [Italics supplied]

Section 3 is significant for another reason highly pertinent to these proceedings. It will be noted that it refers to the Order of the International Joint Commission of October 29, 1952 (docket 68) "or any amendment or modification thereof." The italicized clause was added on the floor of the House of Representatives, at the instance of two Representatives from the region in which petitioner's members are located, who pointed out that, as the result of further studies, the International Joint Commission was considering the modification of Method of Regulation No. 5[28] (100 Cong. Rec. (Daily Ed. May 6, 1954) 5802-5803).

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[27] Section 3(b) directs the corporation to make the necessary arrangements to assure the coordination of its activities with those of the St. Lawrence Seaway Authority of Canada and with the entity authorized to construct and operate the power facilities.

[28] Cf. the following excerpt from a press release of the International Joint Commission dated January 28, 1954, read into the Congressional Record (for the full text of the press release see Appendix B, *infra*, pp. 27-29):

> "* * * To the extent that the method of operation known as Method No. 5, which was tentatively approved in the Order, does not fully satisfy all of those requirements, it will be modified by the Commission as provided for in the Commission's Order of October 29, 1952 which makes the method of regulation subject to such further modification as the Commission deems necessary.
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> The investigation now being conducted by the International Lake Ontario Board of Engineers has thus far shown that in respect to some of

ARGUMENT

Petitioner attacks the grant of a license for the St. Lawrence power project to the New York Power Authority on the ground that construction of the project would raise Lake Ontario to levels which would damage the riparian beach properties owned by petitioner's members, and that the license will therefore take the property of petitioner's members without just compensation.

We shall show that these arguments are completely without merit for the following reasons, *inter alia*:

(1) Petitioner's assumption that its members' lands will be flooded as a result of the project has no support whatsoever in the evidence and is inconsistent with the Commission's findings.

(2) Even assuming damage to the riparian lands, this would be far outweighed by the many other interests to be benefited by the power project, with the result that such damage in and of itself would not be sufficient reason for invalidating the Federal Power Commission's license.

(3) Again assuming damage to the riparian lands, the Federal Power Act, the Power Commission's order, the Boundary Waters Treaty of 1909, creating the International Joint Commission, the order of the International Joint Commission approving the St. Lawrence Project, the United States Constitution, and the Constitution and statutes of the State of New York, all guarantee just compensation for any property losses caused by the project.

(4) The level or flow of international streams is subject to regulation by the International Joint Commission, the

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the datum points and also in relation to the calculation of flow, there are indications that the criteria used in the development of Method of Regulation No. 5 require modification. These are matters which the two Chairmen announced the Commission will correct as soon as the International Lake Ontario Board of Engineers has completed its investigations and given the Commission the required basis for constructive action." [100 Cong. Rec. (Daily Ed. May 6, 1954) 5803.]

action of which is not reviewable in American courts, rather than by the Federal Power Commission. The method of regulation of the level or flow of the water, to which this petitioner is objecting, and which was prescribed by the International Joint Commission, is now being reconsidered by that Commission, in large part at the instance of petitioner's members.

Furthermore, since the decision below, Congress has enacted the St. Lawrence Seaway Development Corporation Act, Public Law 358, approved May 13, 1954, 68 Stat. 92, which authorizes the United States to participate in the construction of the St. Lawrence Seaway. As we have shown, that statute (*supra*, p. 12) on its face contains manifestation of congressional approval of the license to New York to construct the power project. And the amendment discussed at page 12 indicates that Congress considered petitioner's interests adequately protected by the International Joint Commission's reconsideration of Method of Regulation No. 5.[29]

Hence, in evaluating this petition it must be realized that the administrative action here involved has in substance received Congressional approval and that petitioner, in effect, seeks to block a Congressional plan for the development of the Great Lakes region.

1. Petitioner's Assumption That It Will Be Injured as the Result of the Project Is Not Supported By Any Findings Nor By Any Evidence.

The petitioner presents to this Court as if it were a fact that the project will raise the level of Lake Ontario nine to eleven inches higher than its natural state, thereby inflicting damage running into the millions of dollars upon petitioner's members. (Pet. 7) There are no findings supporting this keystone of petitioner's case, nor is there any evidence to this effect.

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[29] Cf. the statements made by Representatives Keating and Ostertag on the floor of the House (100 Cong. Rec. (Daily Ed. May 6, 1954) 5802-5803) with their testimony before the International Joint Commission (R. 409-410).

The Presiding Examiner found that there was "no affirmative showing of any damage * * *. * * * This limitation [of the operating level to 238 feet] may or may not render impossible the damages suggested by the Interveners as certain to result from Project construction." (R. 122). The Federal Power Commission in its denial of petitioner's petition for rehearing found that there "are no facts in the record and no allegations of facts in the petition for rehearing which would show that the petitioner herein is an aggrieved party * * *" (R. 260). In other words, the Commission found that the project would not injure petitioner's property. Under Section 313(b) of the Federal Power Act this finding of fact is conclusive if supported by substantial evidence.

The Court of Appeals found that there "is a dispute as to whether the project works to be constructed under the license will or will not increase the water levels in Lake Ontario" (R. 433); it did not set aside the finding of the Federal Power Commission.

Petitioner's entire argument is based on the assumption that this Court will reexamine this question of fact, three times decided adversely to it. Its argument is based to a large extent on matters which never formed a part of the record before the Federal Power Commission, but were contained in petitioner's motion before the Court of Appeals to adduce additional evidence (R. 406-420) which was denied (R. 421).

Although it may be assumed that there are lake levels at which the property of petitioner's members will be flooded,[30] petitioner has not shown that such flooding would be caused by the power project. A mere reading of the only testimony in the record before the Federal Power Commission remotely bearing upon this problem, that of Messrs. Burton and Leerburger (R. 391-399), will show not only that it does not support petitioner's contention, but indicates that

[30] The figure of 247 feet referred to at p. 4 of the Petition is based merely upon a statement of petitioner's counsel.

the water levels will be lower. For power purposes it is necessary to maintain a level between the power dams and the Iroquois dam of from 238 to 242 feet, and the evidence indicated that the only difference between the level at Iroquois dam and at Lake Ontario would be from two to three feet (R. 394). Thus the levels required by the power project would not cause Lake Ontario levels to reach 247 feet.

Petitioner's attack, hence, is directed against Method of Regulation No. 5, designed to control the levels of Lake Ontario so as "to keep the fluctuations of the levels of Lake Ontario within those which would have resulted in the past" (R. 379) and to "most nearly satisfy the conditions necessary to protect all interests involved" (R. 380). The evidence, however, showed that the highest level obtainable under Method of Regulation No. 5 (249.10 feet) would be less than the maximum lake level which has occurred in nature, *viz.*, 249.27 feet (R. 393-394, 398). Petitioner, of course, is injured by Method of Regulation No. 5 only if it provides for floodings in excess of those which would occur in nature.

Petitioner, consequently, seeks to establish that the 249.27 level is not the natural level of Lake Ontario but that it has been brought about artificially by the Gut Dam built in 1903,[31] the removal of which was directed in the same Order of the International Joint Commission which petitioner is here attacking (R. 359, 365). Although petitioner did not submit to the Federal Power Commission any evidence tending to show that Gut Dam had raised the level of Lake Ontario (R. 394-395), it claims here that its Exhibit at R. 417A[32] establishes that as the result of Gut Dam the lake level was raised by 9 to 11 inches as the result of

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[31] The Gut Dam was a short low dam between two islands in the St. Lawrence River but not all the way across. (See H. Rept. 1215, 83d Cong., 2d Sess., second Map facing p. 92). Its purpose was to "improve the navigation of the regular channel." H. Rept. 1888, 57th Cong., 1st Sess.

[32] This exhibit was attached to its motion in the Court of Appeals to adduce additional evidence (R. 406) which was denied (R. 421) as we have pointed out above (p. 10, fn. 23; 15).

Gut Dam. Actually, petitioner's graph does not have this effect at all. All it shows is the relation between the water level and the rate of discharge, and indicates that subsequent to the construction of Gut Dam a somewhat higher water level corresponds to a given rate of discharge. The graph, however, is inconclusive because it does not show to what extent Gut Dam and the channel improvements connected with it increased the speed of the discharge, thus lowering the lake level. Indeed, studies have shown that the highest monthly levels on Lake Ontario were reached prior to 1903 before Gut Dam was built rather than after.[33] Nor can any inference be drawn from the circumstance that the level of Lake Ontario was lower in 1953, *i.e.*, after the removal of Gut Dam, than it had been in 1951 and 1952 (R. 407). The high lake levels in the latter two years were caused by abnormally heavy rains in the Great Lakes area, while precipitation was swinging back to normal in 1953 (100 Cong. Rec. (Daily Ed., Jan. 20, 1954) p. 526).

What petitioner is really seeking is a guarantee by the New York Power Authority of lake levels so abnormally low as to prevent all flooding resulting from natural cyclic variations. It has not been shown that any flooding which would not otherwise occur would be caused by the power project.[34]

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[33] St. Lawrence Waterway Project, Regulation of Outflows and Levels of Lake Ontario, Method No. 5, prepared by Special Projects Branch, Department of Transport, Ottawa, Ontario, March 1952, pp. 12-15. This report, of which judicial notice may be taken, was submitted to, and considered by the Court below. It would have been introduced in evidence before the Federal Power Commission had petitioner offered any pertinent evidence there.

[34] The same considerations apply to petitioner's assertions about the extent of its damages. It did not submit any pertinent evidence on this issue to the Federal Power Commission (R. 391-399). The assertion that "the worth of the properties thus taken runs into millions of dollars" (Pet. 7) refers not to the record before the Federal Power Commission but to an *ex parte* affidavit (R. 418-490) attached to its motion in the Court of Appeals to adduce additional evidence. See *supra*, p. 10, fn. 23; 15.

2. Any Damage to Petitioner's Beach Property Would Be Far Outweighed by Benefits to the Public Generally.

However, even if we assume for the sake of argument that as the result of the project here under review petitioner's interests are subject to greater jeopardy than before, this still would not require the denial of the license. Every project of this sort requires to some extent a balancing of the several conflicting interests. Lands along the St. Lawrence River undoubtedly will be flooded and paid for, cf. p. 3, fn. 1. Here we have some 1,500 owners of waterfront property along Lake Ontario desiring the regulation of the river at a low level. The port of Toronto on the same lake, however, needs high water; the high rate of discharge in spring desired by petitioner (Pet. 8) might cause harbor damage at Montreal and other points downstream; it might also jeopardize the power project here involved for lack of water during the summer months. The importance of the electric power itself hardly can be overstated, in view of the power shortage in the area to be served by it. R. 206, 286, 401-405.[35]

Moreover, the St. Lawrence Seaway, which Congress has regarded as vital for our national defense,[36] cannot be built without this power project (*supra*, p. 12). In these circumstances the Commission reasonably could have concluded that any possible injury to the relatively few riparian landowners represented by petitioner was far outweighed by the benefit to the power users in the northeastern area, not to mention the inhabitants of the entire Great Lakes region. Indeed no sensible person could have concluded otherwise. And this is particularly so when petitioner, as a matter of law, would receive compensation for any damage caused by the project.

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[35] See also S. Rept. 441, 83d Cong., 1st Sess., p. 26, pointing to the urgency of the project, and the reference to it by the Court of Appeals (R. 434).

[36] H. Rept. 1215, 83d Cong., 2d Sess., pp. 38-41, 93-95, and see the Title of the St. Lawrence Seaway Development Corporation Act, *infra*, pp. 24-26.

3. Petitioner Is Clearly Entitled to Compensation If as the Result of the Instant Project Its Property Should Be Subject to Additional Injury.

The construction of a power dam frequently requires the taking of or injury to riparian property. The Federal Power Act accordingly confers eminent domain powers upon the licensee of a project (Section 21, *infra*, p. 24), which, of course, means that any damage must be paid for. The Power Authority of the State of New York has similar powers under the state law (New York Power Authority Act, Section 1007).[37] Moreover, as we have pointed out above, Section 10(e) (*infra*, p. 24) of the Federal Power Act, incorporated into the license, specifically makes the licensee liable for damages caused by the construction, maintenance, and operation of a project.[38] Article VIII of the Boundary Waters Treaty *infra*, pp. 23-24, and the Order of Approval of the International Joint Commission provide for similar remedies.

Petitioner claims that it is not properly protected under the Order of Approval because paragraph (i), setting forth the considerations for the regulation of the lake level refers only to paragraphs (b), (c), and (d), and not to paragraph (a) providing for the adequate protection and indemnity of persons injured by reason of the works (Pet. 9).

As we have pointed out above (p. 7), paragraph (d) (R. 360) is carefully phrased so as to protect "the rights of all interests affected * * * by the levels of Lake Ontario * * *". It expressly provides that

> any change in levels resulting from the works which injuriously affects such rights shall be subject to the requirements of *paragraph (a) relating to protection and indemnification.* [Italics supplied.]

Petitioner further claims that its remedies, if any, would be futile on account of difficulties of proof and because

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[37] Section 1007(7) expressly authorizes the Power Authority to utilize the procedure of Section 21 of the Federal Power Act, see *infra*, pp. 26-27.

[38] Cf. *Henry Ford and Son* v. *Little Falls Co.*, 280 U.S. 369, only recently referred to in *Federal Power Comm.* v. *Niagara Mohawk Power Corp.*, 347 U.S. 239, 254.

judgments against the Power Authority could not be satisfied. The circumstance that it would not be easy for petitioner to show that any injury it would suffer in the future was caused by the licensee, and not by other sources, cannot of course be a reason to deny the license. If this were the law the more speculative the objections to a license, the less it could be granted. Just as no way has been discovered of relieving a defendant from the necessity of defending a law suit even if groundless,[39] no method has been elaborated as yet to alleviate a plaintiff's burden of proving a difficult case.

No merit attaches to petitioner's allegation that the Power Authority of the State of New York would be judgment proof[40] (Pet., p. 13), or to its assumption that the Authority would be too weak financially to pay for damages caused by it. Section 1010 of the New York Power Authority Act (*infra*, p. 27) does not mean that petitioner's claims, if any, would be subordinate to the lien of the revenue bonds. The pledge of the revenue to the bondholders constitutes a pledge of the net income after payment of expenses.[41] The argument that the Power Authority will not have any funds available to pay petitioner before it starts its operations ignores the facts that no damage can ensue before the dams are completed and that profitable operation will start immediately thereafter.

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[39] *Myers* v. *Bethlehem Corp.*, 303 U. S. 41, 51-52.

[40] The Power Authority of the State of New York does not enjoy sovereign immunity from suit. N. Y. Power Authority Act, Sec. 1002, *infra*, p. 26.

[41] And see *Guardian Trust Co.* v. *Keith*, 69 F. 2d 477 (C.A. 8), certiorari denied, 292 U.S. 652, to the effect that the constitutional obligation to pay just compensation for property flooded by a drainage district had priority over bonds supported by a pledge of all the property and revenues of the district.

4. The International Joint Commission has Jurisdiction to Regulate Water Levels and it is Presently Reconsidering Method of Regulation No. 5.

Up to now the legal discussion has proceeded upon the double assumption that the Federal Power Commission has issued the Method of Regulation No. 5 and that this method is still in effect, and we have shown that petitioner could not succeed even if those suppositions were true. Actually, however, neither of them is correct.

Method of Regulation No. 5 was not adopted by the Federal Power Commission but by the International Joint Commission. It was incorporated into the Federal Power Commission license (Art. 19, R. 214) by virtue of Article III of the Boundary Waters Treaty (*infra*, p. 23). In these circumstances it appears doubtful whether the review provisions of the Federal Power Act (Section 313(b)) apply to Method of Regulation No. 5, a determination of an international tribunal. Judicial review is frequently limited where the subject matter of the dispute touches upon international affairs. See, *e.g.*, *Chicago & Southern Air Lines* v. *Waterman SS Corp.*, 333 U.S. 103. And in any event our courts lack jurisdiction to review the decision of international tribunals. *Hirota* v. *MacArthur*, 338 U.S. 197, 198; *Z. & F. Assets Corp.* v. *Hull*, 311 U.S. 470.

Furthermore, the International Joint Commission is now reconsidering Method of Regulation No. 5, in part because of the very objections made by petitioner here.

The familiar principle that courts will not review incomplete administrative action would seem to apply *a fortiori* to petitioner's attempt to have this court overturn the Federal Power Commission order when this subject is presently under consideration by a different commission which has primary and authoritative jurisdiction over it.

CONCLUSION

Almost all of the questions to which petitioner has addressed its brief involve unique facts. Not only is there no conflict of decisions, but petitioner has been unable to cite a single case to support its contentions. Petitioner's standing to object to this important public improvement, as the representative of landowners who will be compensated if damaged by the project, is highly questionable. There is clearly no substance to any of the reasons advanced by petitioner for the grant of certiorari. The petition should be denied.

Respectfully submitted,

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MURRAY PRESTON

May, 1954

APPENDIX A.

1. The Boundary Waters Treaty of 1909 (36 Stat. 2448) provides in pertinent part:

ARTICLE III.

It is agreed that, in addition to the uses, obstructions, and diversions heretofore permitted or hereafter provided for by special agreement between the Parties hereto, no further or other uses or obstructions, or diversions, whether temporary or permanent, of boundary waters on either side of the line, affecting the natural level or flow of boundary waters on the other side of the line, shall be made except by authority of the United States or the Dominion of Canada within their respective jurisdictions and with the approval, as hereinafter provided, of a joint commission, to be known as the International Joint Commission.

* * * * *

ARTICLE VIII.

The International Joint Commission shall have jurisdiction over and shall pass upon all cases involving the use or obstruction or diversion of the waters with respect to which under Articles III and IV of this treaty the approval of this Commission is required, and in passing upon such cases the Commission shall be governed by the following rules or principles which are adopted by the High Contracting Parties for this purpose:

* * * * *

The Commission in its discretion may make its approval in any case conditional upon the construction of remedial or protective works to compensate so far as possible for the particular use or diversion proposed, and in such cases may require that suitable and adequate provision, approved by the Commission, be made for the protection and indemnity against injury of any interests on either side of the boundary.

In cases involving the elevation of the natural level of waters on either side of the line as a result of the construction or maintenance on the other side of remedial or protective works or dams or other obstructions in boundary waters or in waters flowing therefrom or in waters below

the boundary in rivers flowing across the boundary, the Commission shall require, as a condition of its approval thereof, that suitable and adequate provision, approved by it, be made for the protection and indemnity of all interests on the other side of the line which may be injured thereby.

* * * * *

2. The Federal Power Act (41 Stat. 1063, as amended, 16 U.S.C. 791-823) provides in pertinent part:

SEC. 10. All licenses issued under this Part shall be on the following conditions:

* * * * *

(c) * * * Each licensee hereunder shall be liable for all damages occasioned to the property of others by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto, constructed under the license, and in no event shall the United States be liable therefor.

* * * * *

SEC. 21. That when any licensee can not acquire by contract or pledges an unimproved dam site or the right to use or damage the lands or property of others necessary to the construction, maintenance, or operation of any dam, reservoir, diversion structure, or the works appurtenant or accessory thereto, in conjunction with an improvement which in the judgment of the commission is desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such land or other property may be located, or in the State courts. * * *

3. The St. Lawrence Seaway Development Corporation Act (68 Stat. 92)

Providing for creation of the Saint Lawrence Seaway Development Corporation to construct parts of the Saint Lawrence Seaway in United States territory *in the interest of national security;* authorizing the Corporation to consummate certain arrangements with the Saint Law-

rence Seaway Authority of Canada relative to construction and operation of the seaway; empowering the Corporation to finance the United States share of the seaway cost on a self-liquidating basis; to establish cooperation with Canada in the control and operation of the Saint Lawrence Seaway; to authorize negotiations with Canada of an agreement on tolls; and for other purposes. [Italics supplied]

reads in pertinent part:

SEC. 3. (a) The Corporation is authorized and directed to construct, in United States Territory, deep-water navigation works substantially in accordance with the "Controlled single stage project, 238-242" (with a controlling depth of twenty-seven feet in channels and canals and locks at least eight hundred feet long, eighty feet wide and thirty feet over the sills), designated as "works solely for navigation" in the joint report dated January 3, 1941, of the Canadian Temporary Great Lakes-Saint Lawrence Basin Committee and the United States Saint Lawrence Advisory Committee, in the International Rapids section of the Saint Lawrence River together with necessary dredging in the Thousand Islands section; and to operate and maintain such works in coordination with the Saint Lawrence Seaway Authority of Canada, created by chapter 24 of the acts of the fifth session of the Twenty-first Parliament of Canada 15-16, George VI (assented to December 21, 1951): *Provided*, That the Corporation shall not proceed with the aforesaid construction unless and until—

(1) the Saint Lawrence Seaway Authority of Canada provides assurances satisfactory to the Corporation that it will complete the Canadian portions of the navigation works authorized by section 10, chapter 24 of the acts of the fifth session of the Twenty-first Parliament of Canada 15-16, George VI, 1951, as nearly as possible concurrently with the completion of the works authorized by this section;

(2) the Corporation has received assurances satisfactory to it that the State of New York, or an entity duly designated by it, or other licensee of the Federal Power Commission, in conjunction with an appropri-

ate agency in Canada, as nearly as possible concurrently with the navigation works herein authorized, will construct and complete the dams and power works approved by the International Joint Commission in its order of October 29, 1952 (docket 68) or any amendment or modification thereof.

(b) The Corporation shall make necessary arrangements to assure the coordination of its activities with those of the Saint Lawrence Seaway Authority of Canada and the entity designated by the State of New York, or other licensee of the Federal Power Commission, authorized to construct and operate the dams and power works authorized by the International Joint Commission in its order of October 29, 1952 (docket 68) or any amendment or modification thereof.

4. The New York Power Authority Act (New York Public Authorities Law Title I, Article 5) provides in pertinent part:

§ 1002. Power Authority of the State of New York

For the purpose of effectuating the policy declared in section one thousand one of this chapter and of improving the Niagara and Saint Lawrence rivers as instrumentalities of commerce and navigation and developing the hydroelectric power resources thereof, there is hereby created a corporate municipal instrumentality of the state to be known as "Power Authority of the State of New York," hereinafter in this title referred to as "the authority," which shall be a body corporate and politic, a political subdivision of the state, exercising governmental and public powers, perpetual in duration, capable of suing and being sued, and having a seal, and which shall have the powers and duties hereinafter enumerated, together with such others as may hereafter be conferred upon it by law.

It shall report annually to the governor and the legislature upon its operations and transactions.

§ 1007. Acquisition of Property

* * * * * * * * * *

7. The authority may, at its option, acquire such real property within the state of New York, under the general condemnation law or, in the event it is a licensee of the federal power commission it may acquire such real prop-

erty as is necessary for its purposes through the exercise of the right of eminent domain as provided in section twenty-one of the federal power act, as amended.

* * * * * * * * * *

§ 1010. BONDS OF THE AUTHORITY

* * * * * * * * * *

It is the intention hereof that any pledge of revenues or other moneys or of a revenue producing contract or contracts made by the authority shall be valid and binding from the time when the pledge is made; that the revenues or other moneys or proceeds of any contract or contracts so pledged and thereafter received by the authority shall immediately be subject to the lien of such pledge without any physical delivery thereof or further act; and that the lien of any such pledge shall be valid and binding as against all parties having claims of any kind in tort, contract or otherwise against the authority irrespective of whether such parties have notice thereof. Neither the resolution nor any other instrument by which a pledge is created need be recorded.

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APPENDIX B.

Press Release of the International Joint Commission Dated January 28, 1954.

At the conclusion of the meeting of the International Joint Commission in Boston yesterday, Senator A. O. Stanley and General A. G. L. McNaughton, the Chairmen of the United States and Canadian Sections respectively, gave a joint statement to the press.

They said that having regard to certain anxieties expressed by property owners along the shores of Lake Ontario, the Commission had carefully reviewed the terms of its Order of 29 October, 1952, by which it had approved the St. Lawrence River Power Project in the International Rapids Section of that river and is satisfied that the Order of Approval properly protects all interests in both countries which may be affected by the construction or operation of the power works. The two Chairmen went on to say that, not only were all interests properly protected by

the terms of the Order of Approval, but there is every reason to believe that the levels of Lake Ontario, which have been so high in recent years, can be so regulated by means of the works to be built in the St. Lawrence River as to actually benefit property owners and other interests along the shores of Lake Ontario and the St. Lawrence River, as well as the important interests of navigation and hydro-electric power. Channel excavations in the river, coupled with the construction of a dam with adjustable gates capable of discharging the full flood of the river in the event of an emergency, will make it possible for the first time to exercise a beneficial control over the levels of Lake Ontario.

It was explained that the Commission's Order of Approval stipulated that the power works must be so operated as not to conflict with or restrain uses of the St. Lawrence River for purposes which are given a higher priority than power purposes by the Boundary Waters Treaty of 1909; to safeguard the rights of power developments downstream from the works and also, as far as possible, the rights of everyone affected by the levels of Lake Ontario, the lower Niagara River and the St. Lawrence River upstream from Iroquois, Ontario. The Order provides also that if any interest affected by such levels is injured as a result of the works, full indemnity will be provided in accordance with the laws in Canada and the laws and Constitution in the United States.

It was stated that the power works, when completed, will be operated under the supervision of the International Joint Commission in such a way as to satisfy all of the requirements set forth in its Order of 29 October 1952. To the extent that the method of operation, known as Method No. 5, which was tentatively approved in the Order, does not fully satisfy all of those requirements, it will be modified by the Commission as provided for in the Commission's Order of October 29, 1952 which makes the method of regulation subject to such further modification as the Commission deems necessary.

The investigation now being conducted by the International Lake Ontario Board of Engineers has thus far shown that in respect to some of the datum points and also in relation to the calculation of flow, there are indications that the criteria used in the development of Method of Regulation No. 5 require modification. These are matters which the two Chairmen announced the Commission will correct as soon as the International Lake Ontario Board of Engineers has completed its investigations and given the Commission the required basis for constructive action.